IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 991

EDWARD F. QUIRKE,
Petitioner.

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Introduction

The petition fails to comply with the Rules of this Court and it should be denied for that reason alone. Moreover, it does not present any of the special and important reasons which are required for review on certiorari.

Opinions Below

The Memorandum Opinion and Order of the District Court dismissing the complaints (R. 62-68)* is unreported. The Opinion of the Court of Appeals for the Eighth Circuit affirming the dismissal has not been officially reported, but is printed in the Appendix to the Petition (pp. 1A-10A).

*This and subsequent references are to the record printed in the court below, nine copies of which have been filed with this Court.

Jurisdiction

The jurisdiction of the District Court was invoked on the ground of diversity of citizenship under 28 U. S. C. § 1332. The judgment of the Court of Appeals was entered on May 4, 1960. Although the petition does not so state, a writ of certiorari is apparently sought under 28 U. S. C. § 1254(1).

Rule Involved

Rule 23 of the Federal Rules of Civil Procedure provides in part:

Class Actions

> **(a) Representation.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> * * *
>
> **(b) Secondary Action by Shareholders.** In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the

United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

* * *

Questions Presented

Petitioner does not state any specific question for the consideration of this Court.

The only questions raised in the court below are:

(1) Whether petitioner's stockholder's derivative action was properly dismissed for failure of compliance with the requirements of Rule 23(b), Federal Rules of Civil Procedure.

(2) Whether petitioner's bondholder's class action was properly dismissed for failure of compliance with the conditions precedent to suit specified in his contract as set forth in the trust indentures securing his bonds.

(3) Whether, in any event, both class actions were properly dismissed upon findings that they were brought in furtherance of interests adverse to those petitioner purports to represent.*

Statement of the Case

The petition concerns five consolidated class actions involving generally two separate claims against respondents.

*Petitioner implies that this case presents constitutional questions (Pet. 14). No constitutional issue has been raised by either party or decided by either court below.

St. Louis-San Francisco Railway Company (Frisco), its directors and certain of its officers. The first claim is purportedly a stockholder's derivative action; the second a bondholder's action. Petitioner alleges that the proceeds of Frisco's Series B First Mortgage 4% Bonds were diverted from their intended purpose—capital improvements —and used instead to purchase stock of the Central of Georgia Railway Company. Petitioner claims further that the alleged diversion diluted the security behind Frisco's Series A First Mortgage 4% Bonds and its Series A Second Mortgage 4½% Income Bonds of which he is a holder. Further, petitioner claims that Frisco and its stockholders have been injured to the extent of the alleged annual difference between the amount paid out in interest on the Series B First Mortgage 4% Bonds and the amount received in dividends on the Central of Georgia stock. Finally, petitioner predicts that the Interstate Commerce Commission will require Frisco to divest itself of the Central of Georgia stock and that such divestiture will result in "a great loss" to Frisco (R. 42). Until such "great loss" occurs, appellant seeks to neutralize the Central of Georgia stock by having such stock placed in the hands of a trustee. Petitioner also asks that compensatory, punitive and exemplary damages be awarded, plus expenses of this litigation (R. 2-25, 34-46).

Federal jurisdiction was invoked on the ground of diversity of citizenship (R. 2-3, 12-13, 35-36). Petitioner purports to represent the other stockholders and bondholders of Frisco similarly situated, but none of Frisco's many other stockholders and bondholders have seen fit to join with petitioner in his litigation.

Petitioner's real interest in this litigation stems from his ownership of stock in the Central of Georgia. Petitioner has admitted that he regarded Frisco's purchase of stock in the Central of Georgia as "inimical to my investment in

the Central of Georgia" (R. 24a). Moreover, petitioner and a group of Central of Georgia stockholders have repeatedly and vigorously urged the Interstate Commerce Commission to order Frisco to divest itself of all Central of Georgia stock held by it (R. 13a *et seq.*, 20a). Thus would occur the "great loss" predicted by petitioner. In addition, petitioner and his associates have engaged in other litigation in Georgia, seeking to substitute themselves for the current management of the Central of Georgia (R. 21a *et seq.*)

In his complaint in the stockholder's derivative action, petitioner admitted that he had not pursued his remedies within Frisco's corporate structure by seeking relief from the directors and the stockholders. Instead, he alleged that demand on the directors would have been futile because they were hostile and had committed the alleged wrong from which he sought relief. However, in seeking to excuse his failure to seek relief from the stockholders, petitioner alleged in substance that they were so numerous and so widely scattered that it would be expensive, time consuming and impossible to reach them, that it would be impossible to present them with a clear picture of the transaction being attacked; and, in contrast, that despite extensive publicity with regard to the alleged unlawful activities of Frisco, the stockholders had not taken any action (R. 35, 38-43).

The indentures securing the petitioner's bonds impose certain conditions on suits by bondholders. Thus, Article IX, Section 21, of each indenture sets out express requirements concerning notification, request and indemnity as conditions precedent to any such action (R. 59-61). Petitioner did not allege compliance with those conditions and, admittedly, there was no compliance (R. 3a-4a, 34a).

Respondents moved to dismiss both complaints on various grounds, including, among others: (a) as to the stockholder's action, that the allegations of the complaint were

insufficient to comply with Rule 23(b) of the Federal Rules of Civil Procedure, (b) as to the bondholder's action, that the notice, request and offer of indemnity requirements specified by the bond indentures as conditions precedent to the bondholder's action had not been satisfied and (c) as to both actions, that petitioner could not properly represent the stockholders or bondholders of Frisco because his interests in the Central of Georgia were adverse to theirs.*

The District Court granted the motions to dismiss holding (1) that the allegations of the complaint in the stockholder's action failed to comply with the requirements of Rule 23(b), and (2) that the bondholder's action was precluded because of failure to satisfy the applicable conditions precedent specified in the indentures. In addition, the District Court stated that it was of the opinion that the petitioner "does not adequately represent the interest of the class" (R. 68).

The Court of Appeals affirmed, agreeing with the District Court that the allegations of the stockholder's complaint were insufficient, and that the bondholder's suit could not be maintained in the absence of compliance with the conditions imposed in the indentures. With regard to the stockholder's action, the Court of Appeals further held that petitioner "had such adverse interest as made him an unfit person to maintain this class action." (Pet. App., 7a).

*The courts below did not pass upon other grounds urged by respondents in their motions to dismiss including contentions (1) that the issues were within the exclusive primary jurisdiction of the Interstate Commerce Commission, and (2) that as to the bondholder's suit the requisite jurisdictional amount had not been established. (R. 55-58).

ARGUMENT

1. The petition should be denied for failure to comply with the Rules of this Court.

The petition wholly fails to comply with the Rules of this Court, apart from the fact that it is printed and has a proper appendix. In particular, the petition does not "present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration", and it should be denied for that reason alone. Rule 23(4). More importantly, however, it is clear, despite the confusion of the petition, that nothing is presented warranting review by this Court.

2. No reasons are presented which justify certiorari.

This case was decided on narrow issues which turn primarily on the particular facts involved. Those issues are without general application or public importance. In addition, they were correctly decided.*

(A) The first issue is simply whether the allegations of the complaint in the stockholder's derivative action complied with the requirements of Rule 23(b), Federal Rules of Civil Procedure, which provides:

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*The lack of merit in the petition is apparent from the many general, sweeping and unsupported statements which appear in it. In an obvious effort to overcome that lack petitioner indulges in irrelevant and inaccurate reference to certain proceedings before the Interstate Commerce Commission involving Frisco's purchase of stock in the Central of Georgia (Pet., 10-12). The facts in that regard are as follows: By report and order dated November 14, 1958, the Interstate Commerce Commission held that Frisco had violated Section 5(4) of the Transportation Act (49 U. S. C. § 5(4)) and ordered Frisco either to divest itself of the Central of Georgia stock or to transfer such stock to a corporate trustee upon terms and conditions to be approved by the Commission. Frisco followed the latter course and its petition for approval of a voting trustee and the form of a voting trust agreement is now before the Commission.

> "The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

In holding that this particular complaint did not comply with those requirements, the courts below were but following settled principles laid down in such cases as those cited in the opinion of the Court of Appeals, including *Haffer* v. *Voit*, 219 F. 2d 704 (6th Cir. 1955), *certiorari denied sub nom Ames* v. *Mengel Co.*, 350 U. S. 832 (1955), in which allegations of excuse such as petitioner makes here—that it would be expensive and time-consuming to contact the other stockholders—were held legally insufficient to meet the requirements of Rule 23(b). See also *Heinz* v. *National Bank of Commerce*, 237 Fed. 942 (8th Cir. 1916); *Stone* v. *Holly Hill Products*, 56 F. 2d 552 (5th Cir. 1932). There is no conflict of decisions on this point.*

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*The claim in the petition (p. 8) that the decision below conflicts with four decisions of this Court is untenable. None of those four cases involved Rule 23(b) or the requirements for pleading thereunder. In addition, two of them—*i.e.*, *Price* v. *Gurney*, 324 U. S. 100 (1945), and *Smith* v. *Sperling*, 354 U. S. 91 (1957), did not involve the requirements for bringing stockholder's derivative actions. *Price* involved simply the question whether stockholders could file a petition in bankruptcy for the corporation. *Smith* assumed that the stockholder's action was proper and centered instead solely on the question of alignment of parties for diversity jurisdiction. The third case, *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288 (1936), is wide of the mark, for the suing stockholder there had the support of "approximately 1900 preferred stockholders", 297 U. S. at 318. The fourth case relied upon, *United Copper Securities Company* v. *The Amalgamated Copper Co.*, 244 U. S. 261 (1917), is wholly in accord with the result below for, in affirming a dismissal of a stockholder's action, this Court there said that as a rule such actions would be entertained "only after application to the stockholders," and pointed out that the plaintiff had not made such an application and that "no special facts are shown which render such application unnecessary".

If the issue be viewed as a question of petitioner's substantive rights rather than as a matter of procedure, it should be borne in mind that this is a diversity action in which such substantive rights are dependent upon the law of the State of Missouri. As the District Court sitting in Missouri pointed out, the Missouri rule in stockholder's suits of this kind, involving claims that corporate funds have been misapplied, is to require a stockholder to exhaust all remedies within the corporation, by applying for relief to the directors and to the stockholders, before filing a derivative action (R. 66).

Accordingly, the stockholder's action was properly dismissed because of petitioner's failure to exhaust his remedies within the corporation or to allege a legally sufficient excuse for that failure.

(B) Likewise, the dismissal of the bondholder's suit because of petitioner's failure to comply with the conditions precedent to suit laid down in Article IX, Section 21, of the bond indentures, raises no question for review by this Court. In the first place, it involves only the construction of common contract provisions conditioning petitioner's right to bring this suit. In this diversity action, that construction, of course, depends upon the law of the State of Missouri. In the second place, the holdings below were clearly correct. As the Court of Appeals stated, the restrictions specified in the indentures "are both reasonable and salutary", and cannot be evaded by petitioner's assertion that he is seeking to sue on the bonds but not under the indentures and is merely seeking to protect himself against loss or damage. *Home Mortgage Co.* v. *Ramsey*, 49 F. 2d 738 (4th Cir. 1931); *Allan* v. *Moline Plow Co.*, 14 F. 2d 912 (8th Cir. 1926); *Muren* v. *So. Coal & Mining Co.*, 177 Mo. App. 600, 160 S. W. 835 (1913).

In any event, this is not an issue meriting the consideration of this Court. There is no reason why this Court

should review the construction of these particular indentures involving, as it does, a private matter of local law which has been resolved against petitioner by the two courts below most familiar with that local law.

(C) Wholly independent of the foregoing, the stockholder's suit and the bondholder's suit were required to be dismissed because of the findings below that petitioner had interests adverse to those of the classes he purported to represent. It is, of course, fundamental that a class action can be maintained only by such a member of the class "as will fairly insure the adequate representation of all". Rule 23(a), Federal Rules of Civil Procedure.

The District Court stated that petitioner "does not adequately represent the interest of the class" (R. 68). Though limiting its discussion to the stockholder's derivative suit, the Court of Appeals likewise found that petitioner "had such adverse interests as made him an unfit person to maintain this class action" (Pet. App., 7A). These findings have adequate support in the record (R. 16a-25a, 30a-34a), which discloses that petitioner's purpose is not to further the interests of the stockholders and bondholders of Frisco but is instead to further his own interests in the Central of Georgia.

Clearly, the concurrent findings of adverse interest made by the two courts below will not be reviewed by this Court. *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949).

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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